STATE OF MICHIGAN

COURT OF APPEALS

SHERYL L. NEMETH and STANLEY NEMETH,

Plaintiffs-Appellees,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellant,

and

CURTI INSURANCE AGENCY, RELIANCE INSURANCE COMPANY and THE DENNEHY AGENCY, INC. a/k/a MCNISH-DENNEHY AGENCY, INC.,

Defendants.

UNPUBLISHED
October 31, 1997

No. 196407
Wayne Circuit Court
LC No. 95-531598-CK

MICHIGAN BELL TELEPHONE COMPANY a/k/a AMERITECH,

Plaintiff-Appellee,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellant,

and

CURTI INSURANCE AGENCY, INC. and THE DENNEHY AGENCY, INC.,

No. 196409
Wayne Circuit Court
LC No. 95-531597-CK

Defendants.

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

In these consolidated cases involving attempts to collect on default judgments from the insurer of the defaulted party, defendant Lake States Insurance Company ("Lake States") appeals by right from orders granting plaintiffs Nemeth and Michigan Bell's motions for summary disposition on the ground that Lake States was not materially prejudiced by its insured's failure to timely notify it of the underlying lawsuit. We reverse.

On April 20, 1993, Sheryl Nemeth broke her ankle when she slipped and fell in a cross-walk. In early 1994, Nemeth and her husband, Stanley, commenced an action against the various governmental entities that may have had jurisdiction over the road. They later amended their complaint to assert claims against Michigan Bell and its contractor, Metro Utility, alleging Metro Utility's negligent performance of excavation work created the defect that caused Nemeth's injuries. Under their contract, Metro Utility was obligated to fully indemnify Michigan Bell for any loss arising out of the work. At the time Metro Utility performed the work, it was insured by Reliance Insurance Company through a policy obtained with the assistance of The Dennehy Agency. At the time of the accident, however, Metro Utility was insured by defendant Lake States through a policy obtained with the assistance of defendant Curti Insurance Agency.

When served with the complaint, Metro Utility's president, Harry Ackley, submitted the pleading to Reliance Insurance. Reliance Insurance declined to provide a defense, and Metro Utility, which went out of business in 1993, did not answer the complaint or defend against the action. Michigan Bell filed a cross-claim against Metro Utility for indemnification, and defaults were eventually entered against Metro Utility on both the cross-claim and the Nemeths' claims. Plaintiffs Nemeth and Michigan Bell accepted mediation, and on June 1, 1995, the trial court entered a judgment in the amount of $300,000 against Michigan Bell, a default judgment in the amount of $200,000 in Nemeths' action against Metro Utility, and a default judgment in the amount of $300,000 in Michigan Bell's action against Metro Utility for indemnification. In late June, Michigan Bell wrote letters to defendant Lake States and defendant Curti Insurance, notifying them of its demand that Lake States satisfy the $300,000 judgment. In a reply letter dated July 6, 1995, defendant Lake States declined to satisfy the judgment because, it maintained, it was prejudiced by the fact that it was not notified of the action until after Michigan Bell accepted mediation and the court entered judgment. Three months later, plaintiffs Nemeth and Michigan Bell commenced the present actions against Lake States to collect on the judgments.

Defendant Lake States contends the trial court erred in granting plaintiffs Nemeth and Michigan Bell's motions for summary disposition pursuant to MCR 2.116(C)(10) when there was a question of fact regarding whether Lake States was prejudiced by the late notice of the underlying lawsuit. We agree. This Court reviews a trial court's grant of summary disposition de novo. *Fitch v State Farm*

Fire & Casualty Co, 211 Mich App 468, 470; 536 NW2d 273 (1995). We must consider the entire record, including pleadings, affidavits, depositions, and other available evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* In order to properly grant summary disposition, the court must find the record that might be developed would not leave open any issues upon which reasonable minds may differ. *Wolfe v Employers Health Ins Co (On Remand),* 194 Mich App 172, 175; 486 NW2d 319 (1992).

In this case, Lake State's insured, Metro Utility, did not comply with the terms of its insurance policy requiring it to provide written notice of an "occurrence" as "soon as practicable," and forward the pleadings to Lake State when the Nemeths filed suit. Nevertheless, the failure to comply with a notice provision does not relieve an insurer of its obligation to provide a defense and coverage unless the insurer was prejudiced by the insured's failure to provide timely notice of the underlying lawsuit. See *Koski v Allstate Ins Co,* 213 Mich App 166, 173-175; 539 NW2d 561 (1995), lv gtd 454 Mich 877 (1997); Cf. *Wood v Duckworth,* 156 Mich App 160, 162-163; 401 NW2d 258 (1986) (lack of notice is not a defense to garnishment seeking recovery of insurance proceeds to satisfy a judgment unless the insurer can show both prejudice and that the delay was unreasonable). The notice need not be provided by the insured, so long as the insurer was not prejudiced by the timing of the notice. *Koski, supra* at 173-174. The insurer bears the burden of proving prejudice, and the question of prejudice is one for the trier of fact. *Burgess v American Fidelity Fire Ins Co,* 107 Mich App 625, 628-629; 310 NW2d 23 (1981).

Defendant Lake States argues the trial court erroneously concluded that the present case is controlled by *Burgess, supra*. We agree. In *Burgess,* this Court affirmed a judgment rendered in favor of the plaintiff in garnishment proceedings against the insurer of the defendant in the underlying automobile negligence action. The insurer first received notice of the underlying action when the plaintiff forwarded it a copy of a default judgment. Upon review of the evidence, this Court concluded the trial court's factual finding that the insurer was not prejudiced by the late notice was not clearly erroneous. *Burgess, supra* at 630-631. This Court initially noted that the insurer did not pursue a motion to set aside the default judgment in a timely manner after receiving notice. However, this Court reasoned that the ultimate issue of whether an insurer could escape coverage involved a balancing of the risk of leaving the plaintiff with an uncollectable judgment against the insurer's opportunity to protect its interest when it was not provided notice. In the insurance context, this Court found any prejudice resulting from the denial of the opportunity to defend does not become material where the insurer, upon receiving notice, does not properly act to protect both its interest and that of its insured. Therefore, this Court concluded, the trial court did not clearly err in finding that the insurer was not prejudiced by the late notice. However, this Court noted that if the insurer had promptly and properly moved to set aside the judgment, a different situation would exist. *Id.* at 629-630.

We reject plaintiffs' assertion that *Burgess, supra*, establishes a requirement that an insurer must move to set aside a default judgment against its insured in order to demonstrate it was prejudiced by the lack of timely notice of the lawsuit. Although this Court focused on the insurer's failure to promptly move to set aside the default judgment in *Burgess, supra*, we did so in the context of reviewing a trial court's findings of fact. In most cases, if the insurer can successfully set aside the judgment, it has not suffered any prejudice because it can fully defend against the claims. Thus, this Court has noted that the absence of notice of an action until after entry of a default judgment does not

conclusively establish prejudice. *Koski, supra* at 174. Given that the existence of a default judgment is not dispositive of the prejudice question, we conclude that the failure to move to set aside the judgment does not conclusively establish that any prejudice was not material. The insurer's failure to move to set aside the default judgment is merely one factor to consider in determining whether it has met its burden of proving prejudice. The ultimate question of prejudice is a question of fact to be resolved by the trier of fact. *Burgess, supra* at 629.

Giving defendant Lake States the benefit of any reasonable doubt, there exists a question of fact regarding whether Lake States was prejudiced by the late notice of the underlying lawsuit.[1] For purposes of their motions for summary disposition, plaintiffs assumed that Lake States first received notice of the underlying lawsuit on July 3, 1995. By the time Michigan Bell notified Lake States of the underlying action, the twenty-one day period for moving to set aside the default judgment upon a showing of good cause had elapsed. MCR 2.603(D)(2). Lake States was limited to moving on Metro Utility's behalf for relief from judgment pursuant to MCR 2.612. The trial court denied Metro Utility's May 1996 motion to set aside the judgments, and this Court and the Michigan Supreme Court subsequently denied Metro Utility's application for leave to appeal from that decision. However, even if Lake States could have successfully set aside the default judgments, Michigan Bell had already settled the Nemeths' claims and Lake States could not litigate the issue of Michigan Bell's liability. Furthermore, as in *Wood, supra*, a balancing of the parties respective interests may weigh in favor of Lake States because the Nemeths did not know that Metro Utility had insurance at the time they filed the lawsuit. Moreover, Michigan Bell has already paid the Nemeths $300,000 in compensation. Because there is a question of fact regarding whether Lake States was prejudiced by its lack of notice of the underlying lawsuit until after default judgments were entered against its insured, the trial court erred in granting plaintiffs' motions for summary disposition.

Reversed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] We make no judgment on whether prejudice exists in this case.